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**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to  
Develop an Electricity Integrated  
Resource Planning Framework and to  
Coordinate and Refine Long-Term  
Procurement Planning Requirements.

Rulemaking 16-02-007

**ADMINISTRATIVE LAW JUDGE'S RULING GRANTING  
TWO MOTIONS FOR OFFICIAL NOTICE**

**Summary**

This ruling grants both the October 7, 2016 Motion of the City of Lancaster, Marin Clean Energy, and Sonoma Clean Power Authority for Official Notice and the March 6, 2017 Motion of Magellan Wind LLC for Official Notice of Executive Actions Relating to the Potential Value of California's Offshore Wind Resources, for purposes of taking official notice that certain local, state, and federal agency actions have occurred, but not for purposes of reliance on any underlying facts associated with those actions. The Commission will separately weigh the facts and evidence associated with the agency actions, along with any other information submitted by other parties, in this proceeding.

**1. Motions and Responses**

**1.1. Motion of City of Lancaster, Marin Clean Energy,  
and Sonoma Clean Power Authority for Official Notice**

On October 7, 2016, the City of Lancaster (Lancaster), Marin Clean Energy (MCE), and Sonoma Clean Power Authority (SCPA), all active community choice aggregators (CCAs), filed a motion (CCA motion) for official notice of future

load growth among operational CCA programs, as well as the growing number of communities formally exploring and planning CCA programs, including communities that are planning to launch or join CCA programs in the 2017-2018 timeframe.

According to the motion, “The CCA parties are providing information about emerging CCA programs and future load growth at this time primarily for the benefit of the Energy Division, which has the difficult task of engineering a regulatory and analytical framework and planning a logical sequence of events that will culminate in achieving the goals of SB (Senate Bill) 350.”<sup>1</sup> In addition, the motion states that “it is important that the information provided as part of this motion be adopted as part of the record in this proceeding.”<sup>2</sup>

The CCA motion specifically includes CCA program load forecasts for 2017 and 2018 for nine CCAs or prospective CCAs. The motion also asks that the Commission take official notice of the 19 communities listed in the motion which have passed resolutions or taken other formal action to explore CCA programs, or have taken affirmative, formal steps to launch a CCA program within the 2017-2018 timeframe.

**1.1.1. Joint Response of Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company**

Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), and Southern California Edison Company (SCE) (collectively, Joint Utilities) filed a joint response on October 24, 2016. In their

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<sup>1</sup> Motion of the City of Lancaster, Marin Clean Energy, and Sonoma Clean Power Authority for Official Notice, filed October 7, 2016, at 3.

<sup>2</sup> *Ibid.*

response, the Joint Utilities acknowledge the growing interest in CCA programs in a number of communities, but dispute that the Commission should take official notice as described in the motion.

The Joint Utilities assert that the California Evidence Code Section 452(h) requires that, in order for the Commission to take official notice as requested in the CCA motion, the CCA parties must show that the facts of the actions are “not reasonably subject to dispute” and “are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” The Joint Utilities also discuss the Commission’s approach to taking official notice, and the standards associated with it, at some length, pointing out that while the existence of a document or agency actions may be noticeable, those actions cannot be relied upon for the truth of the underlying facts if those facts are subject to dispute.

The Joint Utilities also argue that the purpose of the CCA motion is unclear. They argue that expected launch dates and forecasted loads are not undisputed facts. These may be contested in the proceeding. In addition, the Joint Utilities point out that there is a process, utilizing a “binding notice of intent” for CCAs to launch and begin serving customer load as of a specific date. The Joint Utilities argue that a planned or forecasted launch cannot substitute for that formal process.

Finally, the Joint Utilities also argue that in order for official notice to be taken, the actions need to be relevant to an issue currently being considered in this proceeding.

#### **1.1.2. Reply of City of Lancaster, Marin Clean Energy, and Sonoma Clean Power Authority**

Lancaster, MCE, and SCPA filed a reply to the Joint Utility Response to their motion on November 3, 2016. They argue that the forecasts of existing CCA

load and future CCA launches are “useful and uncontroversial facts”<sup>3</sup> relevant to this proceeding.

In particular, the CCA parties argue that their motion seeks official notice “of the fact that several operational CCA programs have forecast substantial load growth on the order presented in their motion rather than notice of the fact that the CCA programs will serve a certain amount of load on a particular date.”<sup>4</sup>

Similarly, they argue they are seeking notice “of the fact that a number of cities and counties have taken official action to form CCA programs or explore CCA program formation rather than notice of the fact that a certain number of CCA programs will be operational on a particular date.”<sup>5</sup> They acknowledge that CCA load and further formation actions may deviate from the information provided in their motion, but still argue that the information is relevant and suitable for official notice.

The CCA parties acknowledge the Commission’s standards for taking official notice, as pointed out by the Joint Utilities, but argue that those standards go to how the Commission should weigh the evidence, and not the admissibility of the evidence in the first place.

The CCA parties also acknowledge that “load forecasts are projections” but argue this does not disqualify them for purposes of official notice, and point

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<sup>3</sup> Reply of the City of Lancaster, Marin Clean Energy and Sonoma Clean Power Authority, filed November 3, 2016, at 1-2.

<sup>4</sup> *Ibid.*, at 2.

<sup>5</sup> *Ibid.*

out that “the Commission frequently relies on forecasts as a planning tool...despite uncertainties inherent in making judgments about the future.”<sup>6</sup>

**1.2. Motion of Magellan Wind LLC for Official Notice of Executive Actions Relating to the Potential Value of California’s Offshore Wind Resources**

On March 6, 2017, Magellan Wind LLC (Magellan) filed a motion seeking official notice of executive actions at the state and federal levels relating to the potential value of California’s offshore wind resources.<sup>7</sup> Magellan states that it seeks to focus attention of the Commission and its staff on significant actions that Governor Jerry Brown and U.S. Department of Interior officials have recently taken to provide data and analysis needed to evaluate and move toward development of California offshore wind.

Among the actions that Magellan seeks official notice of are:

- A memorandum of understanding signed to form an intergovernmental task force between state and federal officials to evaluate opportunities for offshore renewable energy development off of the California coast.
- Expert studies of the physical and economic aspects of California’s offshore wind resources performed by federal agencies including the Department of Interior’s Bureau of Ocean Energy Management and U.S. Department of Energy’s National Renewable Energy Laboratory.

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<sup>6</sup> Reply of City of Lancaster, Marin Clean Energy, and Sonoma Clean Power Authority, filed November 3, 2016, at 5.

<sup>7</sup> On June 23, 2017, Principle Power Inc. attempted to file a motion that is nearly identical to the Magellan motion, with an augmented list of recent federal and state actions. Principle Power, however, is not a party to this proceeding and therefore their motion was rejected for filing. Consequently, a Joint Utility Response opposing the Principle Power motion was also rejected for filing, since the underlying motion is no longer operative. The disposition of the Magellan motion herein, however, should substantially cover the same issues that Principle Power was attempting to raise.

Magellan's motion states that the Commission has clear authority to take notice of these official actions and should do so because the actions are relevant to core issues in this proceeding.

Magellan acknowledges the Commission's standards for taking official notice, and states that the motion "seeks only official notice of the actions taken by state and federal officials, not acceptance of the factual bases for their actions or the reliability of their analyses and judgments."<sup>8</sup> Magellan states that the granting of official notice "would not commit the Commission to any conclusion concerning the role that offshore wind power should play in the IRP framework."<sup>9</sup>

#### **1.2.1. Response of the Natural Resources Defense Council**

On March 21, 2017, the Natural Resources Defense Council (NRDC) filed a response to the Magellan motion. NRDC supports Magellan's motion, arguing that the actions taken by senior officials in the California state and federal governments promote consideration of the potential role that offshore wind power can play in meeting California's energy and environmental goals. NRDC agrees that official notice of these actions can help provide the basis to incorporate offshore wind resources into the integrated resource planning process, resulting in a more robust, complete, and reliable result.

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<sup>8</sup> Motion of Magellan Wind LLC for Official Notice of Executive Actions Relating to the Potential Value of California's Offshore Wind Resources, filed March 6, 2017, at 8.

<sup>9</sup> *Ibid.*

## **2. Commission's Standard for Taking Official Notice**

The CCA parties, Magellan, and the Joint Utilities all discuss, in various ways, the Commission's standard for taking official notice. That standard is discussed in this section.

The Commission's Rules of Practice and Procedure, Rule 13.9, state that "official notice may be taken of such matters as may be judicially noticed by the courts of the State of California pursuant to Evidence Code section 450 *et seq.*"

Evidence Code Section 452 provides that California courts may, but are not required to, take judicial notice of certain matters. Section 452 (b) states that courts may take judicial notice of "regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States."

Several court cases, and the Commission itself, have also held that only relevant material may be noticed.<sup>10</sup>

Section 452(h) of the Evidence Code allows courts to take judicial notice of "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

The California Supreme Court has stated:

"[T]he taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what is being noticed, and thereby established, is no more than the existence

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<sup>10</sup> See, for example, Decision (D.) 10-09-004 at 5 and D.02-07-043 at 37-39.

of such acts and not, without supporting evidence, what might factually be associated with or flow therefrom.”<sup>11</sup>

The Commission itself employed the same logic in D.02-07-043, stating:

“We make the distinction that taking official notice of the existence of documents should not be confused with taking notice of the truth of the contents. We are mindful that judicial notice of the truth of the content of a court or agency file is proper only “when the existence of the record itself precludes contravention of that which is recited in it....” *Columbia Casualty Co. v Northwestern Nat’l Ins. Co.* (1991) 231 Cal. App. 3d 457, 473 (court may not properly take judicial notice of contents of court papers filed in support of motion for summary judgment). Judicial notice of a document’s content is inappropriate in other instances because the trust of a document’s content is reasonably subject to dispute or constitutes hearsay. *Id.* See also *Garcia v. Sterling* (1985) 176 Cal. App. 3d 17,22 (“Although the existence of statements contained in a deposition transcript filed as part of a court record can be judicially noticed, their truth is not subject to judicial notice.”).<sup>12</sup>

### **3. Discussion**

As discussed above, the Commission may take official notice of the fact that certain local, state, or federal agency actions took place, but may not take official notice of the underlying facts associated with those actions unless the facts are undisputed.

That is not the case in either the CCA motion or the Magellan motion. Although both motions delineate numerous actions taken by local, state, or

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<sup>11</sup> *Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal. 4<sup>th</sup> at 1063-1064 (quoting *Cruz v. County of Los Angeles*, 173 Cal. App. 3d 1131, 1134 (1985)).

<sup>12</sup> D.02-07-043 at 40.



federal agencies, those actions are not based on undisputed facts in this proceeding.

In the case of the CCA motion, the official notice requested relates either to forecasted load or prospective CCA program launches. Because both would take place in the future, neither can be relied upon as facts because, by definition, they have not yet occurred and therefore cannot be verified. In addition, those projections are in dispute by other parties in this proceeding.

Both types of information, however, are relevant to the planning function of this proceeding, as pointed out by the CCA parties. The Commission may take official notice of the actions of the various communities related to CCA formation and load growth, without accepting as fact either the load forecasts or the certainty of future CCA program formation. Instead, the Commission can weigh the evidence presented, along with any other evidence presented by other parties, when deciding how to proceed with its integrated resource planning approach. By taking official notice of the communities considering or implementing CCA programs, the Commission can take their plans into account in its own planning function, without necessarily relying on the forecasts or projected activities as fact.

In the case of the Magellan motion, the situation is similar. Magellan acknowledges, in its original motion, that it is not seeking official notice for purposes of reliance on the facts contained in the state and federal agency actions or reports. Rather, it is seeking only acknowledgment that these activities are occurring, for planning purposes. This seems appropriate, given that the Commission is considering planning assumptions associated with numerous types of electricity resources in this proceeding. The Commission can weigh the

evidence contained in the various agency actions related to offshore wind development, along with any other evidence presented by other parties.

Given that the proceeding, to this point, has been focused on planning and assumptions to be utilized for integrated resource planning, it is appropriate overall for the Commission to take official notice of the agency actions referenced in both the CCA motion and the Magellan motion.

Therefore, the CCA motion and the Magellan motion are both granted, for purposes of acknowledging that the official actions have occurred, but not for purposes of reliance on the underlying facts contained in or leading to those actions.

**IT IS RULED that:**

1. The October 7, 2016 Motion of the City of Lancaster, Marin Clean Energy, and Sonoma Clean Power Authority for Official Notice and the March 6, 2017 Motion of Magellan Wind LLC for Official Notice of Executive Actions Relating to the Potential Value of California's Offshore Wind Resources are both granted, for purposes of acknowledgment that official actions have been taken, but not for purposes of reliance on the underlying facts or analysis contained in or leading to the official actions.

2. The Commission may weigh the evidence contained in both the October 7, 2016 Motion of the City of Lancaster, Marin Clean Energy, and Sonoma Clean Power Authority for Official Notice and the March 6, 2017 Motion of Magellan Wind LLC for Official Notice of Executive Actions Relating to the Potential Value of California's Offshore Wind Resources, along with evidence presented by other parties, for purposes of any planning determinations to be made in this proceeding.

Dated October 10, 2017, at San Francisco, California.

/s/ JEANNE McKINNEY for

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Julie A. Fitch  
Administrative Law Judge